Filed 12/22/08 In re A.G. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.G., a Person Coming Under the Juvenile Court Law.	B207927 (Los Angeles County Super. Ct. No. CK33587)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. STACY S., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Zeke Zeidler, Judge. Affirmed.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Appellant Stacy S. (mother) appeals from (1) the juvenile court's May 14, 2008, order denying her motion to set aside the June 14, 2007, adjudicatory findings and disposition orders for alleged lack of proper notice, and (2) the court's May 14, 2008, order terminating parental rights (Welf. & Inst. Code, § 366.26.)[1] as to her son A.G., now approximately three years old. We find no reversible error as to the arguably less than perfect notice procedures used by respondent Department of Children and Family Services (DCFS) to attempt to contact the transient and often homeless mother, whose son was born at a park. Significantly, any flaw in the notice procedures was harmless beyond a reasonable doubt because mother would not have obtained a more favorable outcome had she attended the jurisdiction and disposition hearings.

FACTUAL AND PROCEDURAL SUMMARY

Mother has a long history of drug abuse, including use of methamphetamine and marijuana, and involvement with the juvenile dependency court. She is the mother of 10 children, none of whom are in her custody. Mother's tenth child, S.S. (born in April of 2008), was removed from her custody soon after the child's birth and is the subject of dependency proceedings under the same juvenile court case number as the case underlying the present appeal.

With regard to S.S., the juvenile court denied reunification services to mother, and this court denied a petition for writ relief in an unpublished opinion, of which we have taken judicial notice. (See *[S.] S. v. Superior Court* (Sep. 10, 2008, B208641) [nonpub. opn.].) As revealed in that prior opinion, "Mother's medical records indicate that she reported 11 miscarriages, one stillbirth, and two elective abortions. Mother surrendered one child at [a hospital] under the 'Safe Haven' program. The juvenile court terminated mother's parental rights to four of her children on June 2, 2005. A fifth child, [A.G., who

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

is the subject of this appeal,] was a dependent child of the juvenile court at the time of [S.S.'s] detention." (*Id.* at p. 2, fn. 2.)

A.G. was born at a park in September of 2005. His father is Victor G., who is not a party to this appeal. When A.G was two weeks old, he moved with his mother and father into the home of his paternal aunt, Eloisa G., who is now the prospective adoptive parent. After several months passed during which mother and father refused to obtain jobs and it appeared they were using drugs, Eloisa asked them to leave. Eloisa told them that A.G. could stay with her, but they took the child and said they would be staying with a friend. Thereafter, the parents left A.G. with Eloisa, sometimes for several days. Eventually, they left the child with her permanently because they were homeless.

Eloisa believed that mother was homeless and lived at a local park under a bridge. Mother visited A.G. occasionally, but failed to assist in the child's care or to provide Eloisa with his immunization records. In April of 2007, mother attempted to take A.G. from Eloisa's home for a few days. Mother was filthy and had many open sores on her skin and, according to Eloisa, appeared to be under the influence of drugs. Eloisa did not feel A.G. would be safe with mother, and she thus called the police. Mother became upset, left before the police arrived, and thereafter stopped trying to visit A.G.

When the police arrived, Eloisa told them that she believed mother was living at the park under a bridge. The police searched, but they could not locate mother. They advised Eloisa to contact DCFS, which she did. DCFS interviewed Eloisa and other paternal relatives. A paternal aunt reported that the father was in jail and mother was a transient. A paternal uncle reported that he had observed the parents use methamphetamine and "crack" in the past. He had seen mother having open sores on her body, acting erratically, and not sleeping at night. The day after A.G. was born, the uncle visited the parents and the child at a park.

On April 25, 2007, DCFS detained A.G. in Eloisa's home and five days later filed a juvenile dependency petition. The petition alleged, in pertinent part, mother's failure to protect the child (§ 300, subd. (b)) because of her history of substance abuse and her failure to provide for the child's ongoing care and supervision, which created a

detrimental environment and the risk of physical and emotional harm to the child, and mother's failure to provide for the child's support (§ 300, subd. (g)). On April 26, 2007, DCFS initiated a due diligence search for mother. Because her whereabouts was unknown, she was not given notice of the detention hearing. At the detention hearing, the juvenile court ordered DCFS to conduct a due diligence search for mother and to initiate an adoptive home study on Eloisa. The court also ordered the court files regarding A.G.'s siblings.

A.G.'s father was located in prison, and the juvenile court set a hearing for May 8, 2008, and arranged for father's attendance. On that date, the father informed the juvenile court that he and mother were homeless when A.G. was born. The father advised DCFS that mother was homeless, and he believed she was living in the city of Reseda or Lake Balboa. DCFS then mailed to mother notices of the scheduled May 31 pretrial resolution conference. DCFS sent the notices to four addresses, two of them in Reseda, one in Canoga Park, and one in Van Nuys.

At the May 31, 2007, pretrial resolution conference, DCFS in its report filed that date indicated that mother had not been located, that a due diligence search for her was initiated on April 26, 2007, and that the "results are still pending." Eloisa reported that mother had come by her home at least twice demanding to see A.G., and that mother had telephoned a few times screaming and using profanity. Eloisa was afraid to let A.G. visit until mother had contact with DCFS.

On June 4, 2007, the juvenile court found that DCFS "has used its best efforts to locate the mother and [there was] notice to the mother at four last known addresses." After admitting relevant reports into evidence, the court found true all allegations in the dependency petition, sustained the petition as pled, and declared A.G. a dependent child. The court denied mother reunification services, but granted the father six months of services and set a review hearing for December 3, 2007.

For the December 3, 2007, hearing, DCFS submitted a "declaration of due diligence" regarding its search for mother that it had completed in September of 2007. The declaration indicated that DCFS had located six possible addresses for mother

(including the address in Tarzana where Eloisa lived), and that it had not received any replies from inquires to the various branches of the armed services, or from the voter registration and postal service resources. According to the status review report for the six-month review hearing, mother's whereabouts was still unknown, and the father agreed that Eloisa should adopt A.G.

Attached to the status review report were notices of the hearing sent to mother at the six possible locations, but the attached proofs of service did not establish that mother was properly served by mail or served personally at those addresses. At the hearing, the juvenile court noted that it needed signed proofs of service for mother. The court ordered DCFS to submit its service logs to the court and to all parties by December 17, 2007, and it continued the pretrial resolution conference to December 21, 2007.

For the December 21, 2007, hearing, DCFS submitted another "declaration of due diligence," which it had completed the day before. The declaration provided five new possible addresses from various sources, two of the addresses in Reseda, and one each in Canoga Park, Winnetka, and Van Nuys. The declaration also indicated that mother was not a member of any of the armed services. Additionally, voter registration and postal service records had addresses for mother, but no record of any current address for her. The declaration also indicated that a search using AT&T online directory revealed no listing for mother.

According to the status review report for the December 21, 2007, hearing, mother's whereabouts was still unknown. Meanwhile, A.G. was thriving in Eloisa's home, and she wanted to adopt him. DCFS asked the juvenile court to terminate reunification services for the father and to set a hearing to free A.G. for adoption. Attached to the status review report were proofs of service, indicating that on December 10, 2007, notice was sent by first-class mail to mother at five specified addresses.

At the December 21, 2007, hearing, the juvenile court found the notice to be proper, terminated the father's reunification services and set a section 366.26 hearing for April 15, 2008. On the April 15 date, DCFS submitted a January 24, 2008, "declaration

of due diligence" regarding its search for mother. In response to the postal service's search for inactive addresses, DCFS indicated that mother was not known at four of the previously identified possible addresses. The declaration concluded that its search efforts were not successful, and that "all" possible addresses found for mother "have been ruled out" as her current address. On February 4, 2008, the juvenile court issued an order for mother to be notified by publication of the section 366.26 hearing.

On April 5, 2008, mother gave birth to S.S., her 10th child. Personnel at the hospital where that child was born contacted DCFS after they learned that mother had had 30 prior pregnancies and 10 births, and that none of her children were in her care. DCFS interviewed mother, who stated that she had been homeless in the past, but was then residing with her boyfriend at an apartment on West Valerio Street in Van Nuys. She indicated she did not have access to a telephone number, but provided DCFS with the telephone number of the boyfriend. Several days later, mother explained that she had broken up with her boyfriend, moved in temporarily with some friends, but left that home and was considering moving back in with her boyfriend. Mother stated she did not have a job, but that she collected recyclable items for money.

Regarding A.G., mother claimed she had not abandoned him, but had an agreement with Eloisa that the child would stay with Eloisa until mother could "get her life together." Mother explained that after the time she tried to take A.G. for a few days and Eloisa called the police, she stopped trying to visit him.

On April 14, 2008, the juvenile court conducted a detention hearing for S.S. and a progress hearing for A.G. Mother and her appointed counsel were present at the hearing. The court ordered mother to appear the next day for A.G.'s section 366.26 hearing. On the next day, the court continued the hearing for a contested proceeding on May 12, 2008, and ordered that any motion to set aside previous orders had to be filed one week prior to the contested section 366.26 hearing.

On May 6, 2008, mother filed a "motion to set aside and/or quash." The motion asserted that DCFS did not make a reasonable effort to locate and notice mother for A.G.'s jurisdiction hearing by failing to obtain mother's telephone number from Eloisa

and then to contact mother by telephone, and also by failing to leave a business card or telephone number with Eloisa. In support of this argument, mother provided her declaration in which she asserted that on two occasions she provided Eloisa with her telephone number. The declaration also stated that mother had lived in Reseda for over 15 years. The motion sought to set aside the juvenile court's findings and orders from the original jurisdiction and disposition hearings held on June 4, 2007.

On May 12, 2008, the juvenile court continued the contested section 366.26 hearing to May 14, so that DCFS could obtain a declaration from Eloisa. In her declaration, Eloisa stated she had no way of contacting mother directly. Eloisa explained that during the time prior to DCFS involvement her only means of contacting mother was through a lady named "Nani" who had a cell phone that was not always working. Eloisa tried to contact mother using this cell phone, but was not always successful. She also tried to find mother at the park where A.G. was born, but was unsuccessful. A parental uncle and Eloisa's boyfriend also looked for mother.

Eloisa's declaration also reiterated the story, which she had previously described, about when mother came to her home in April of 2007, appearing filthy, having open sores on her skin, and apparently being under the influence of drugs, which prompted Eloisa to call the police. At that time, Eloisa told the police about the park where she believed mother could be found. However, the police were unable to locate mother.

Eloisa further related in her declaration that approximately two months after she had contacted the police, mother telephoned her once or twice. Eloisa told mother she needed to call DCFS because A.G. had been assigned a social worker. Mother yelled profanities and responded, "I know the system. You can't do this to me. I know my rights. I know the system." After that telephone call, mother never tried to contact Eloisa or called to ask about A.G. As Eloisa explained, mother "completely disregarded [the child's] existence for an entire year."

At the May 14, 2008, hearing, mother offered no additional evidence. Her counsel argued that DCFS's efforts to locate mother were unreasonable because DCFS never asked Eloisa for a telephone number to contact mother. The juvenile court noted that

although mother stated she had given Eloisa a telephone number, she did not disclose the number. Also, she did not provide an address where DCFS might have been able to locate her. The court further remarked that Eloisa had told mother she needed to contact the social worker, and mother did not do so. The court did not believe mother was unaware of dependency proceedings, and it found that DCFS had made a due diligent search for mother. The court denied mother's motion. The juvenile court then proceeded with the section 366.26 hearing. Mother's attorney acknowledged that the last time mother had visited with A.G. was in April of 2007, and asserted that mother tried to visit more and to have telephone contact but "was told by counsel" that she was not allowed to speak to the child. The court found that mother had made an insufficient offer of proof to be entitled to a contested hearing (citing *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1120-1124), and terminated parental rights.

Mother then filed a notice of appeal from the May 14, 2008, orders denying her motion and terminating her parental rights as to A.G.

DISCUSSION

I. Mother's contentions as to notice.

Mother contends that because of improper notice to her of the June 4, 2007, adjudication and disposition hearing, the juvenile court had no jurisdiction over her and subsequently abused its discretion in denying on May 14, 2008, her motion to set aside the court's jurisdictional findings and disposition order. Mother argues that the DCFS had not conducted or completed a reasonable due diligence search for her by June 4, 2007, and that absent a completed due diligence report to review on that date, the court's finding of proper notice to her had no basis in fact. Thus, according to mother, because the due process error as to proper notice renders the court's disposition order void, the order terminating her parental rights should be reversed.

Mother emphasizes that all the court had before it on June 4, 2007, were copies of four notices that had been sent to four addresses with no due diligence report to establish how the addresses were obtained. Mother further argues that the subsequent due diligence reports that were filed for the December 21, 2007, six-month review hearing

show that DCFS purportedly failed to conduct an adequate investigation to locate her, either prior to the December 21 contested six-month review or prior to the June 4 adjudication and disposition hearings. According to mother, although it may appear that DCFS tried many avenues to search for her, it failed to ask Eloisa and paternal relatives for all information they may have had about mother when A.G. was detained and mother was still in contact with them.

Specifically, for example, mother complains that there is no indication that the social workers ever asked Eloisa or any other relatives if they had a phone number for her or any other possible contact information. Mother also—for the first time on appeal—faults the social workers for failing to call directory information for Reseda or Lake Balboa to determine whether there was a phone listing for her, for not checking homeless shelters, and for inadequately investigating the Valerio Street address.

II. General legal principles as to notice.

It is well settled that "[d]ue process requires that a parent is entitled to notice that is reasonably calculated to apprise him or her of the dependency proceedings and afford him or her an opportunity to object. [Citation.] The child welfare agency must act with diligence to locate a missing parent. [Citation.] Reasonable diligence denotes a thorough, systematic investigation and an inquiry conducted in good faith. [Citation.]" (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) Nonetheless, "there is no due process violation when there has been a good faith attempt to provide notice to a parent who is transient and whose whereabouts are unknown for the majority of the proceedings." (*Ibid.*)

Moreover, "[u]nless there is no attempt to serve notice on a parent, in which case the error has been held to be reversible per se [citations], errors in notice do not automatically require reversal but are subject to the harmless beyond a reasonable doubt standard of prejudice. [Citations.]" (*In re J. H.* (2007) 158 Cal.App.4th 174, 183; see also *In re Justice P., supra*, 123 Cal.App.4th at p. 193.) "If the outcome of a proceeding has not been affected, denial of a right to notice and a hearing may be deemed harmless and reversal is not required. (*In re James F.* (2008) 42 Cal.4th 901, 918.)

III. Forfeiture of the bulk of the notice-related complaints by failure to raise them in the juvenile court, and the failure to establish sufficient facts as to the two notice issues that were raised in mother's motion.

Mother's contentions relating to notice are unavailing for several reasons. First, mother waived most of her specific complaints about notice because she failed to raise them before the juvenile court. This principle is well established, has been applied in contexts analogous to the present case, and requires no elaborate discussion. (See *In re B. G.* (1974) 11 Cal.3d 679, 689; *In re P. A.* (2007) 155 Cal.App.4th 1197, 1208-1210; *Marlene M. v. Superior Court* (2000) 80 Cal.App.4th 1139, 1149.) It is a fundamental rule of appellate procedure that a party cannot assert error on appeal when it failed to raise the issue at the trial court level. (*In re Anthony P.* (1995) 39 Cal.App.4th 635, 641.)

The only arguments about notice actually presented to the juvenile court were (1) that DCFS failed to ask Eloisa for mother's telephone number, and (2) that the social worker failed to provide Eloisa with her business card or a telephone number. As to those two specific complaints presented to the juvenile court in mother's motion, she simply failed to carry her burden as the moving party. (Cf. Cal. Rules of Court, rule 5.570 (h)(1) [burden of proof in analogous section 388 petition][2].) Mother failed to establish those two alleged omissions by the social worker and also failed to establish that, had the social worker either obtained a phone number from Eloisa or left a business card with her, mother would have attended the hearing.

Rather, mother simply assumes that the social worker did not perform those acts because they purportedly were not documented in writing by the social worker. In fact, it appears that such acts were established by an exhibit annexed to mother's own motion. The social worker's "delivered service log" revealed that on April 16, 2007, the social

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[2] We note that DCFS also faults mother for filing a motion "to set aside and/or quash," rather than filing a section 388 petition. A section 388 petition may be the preferred procedural vehicle, but it is not the only method of bringing a notice issue to the attention of the juvenile court.

worker visited Eloisa's residence, "was unable to have contact with [the] family," and "left a business card and [an] attempted contact letter." Moreover, mother could have called the social worker and Eloisa as witnesses at the hearing and asked them about such matters. But, she failed to do so. The juvenile court thus did not abuse its discretion in denying the motion.

Also, mother failed to prove that even if DCFS had asked Eloisa for mother's telephone number or had given Eloisa a business card, it would have then resulted in locating mother. Additionally, there was no indication that if mother had been located, she would have appeared in court. Mother's declaration was the only evidence before the juvenile court, and it did not establish when she gave Eloisa her telephone number. The declaration thus did not establish that Eloisa had the telephone number prior to the jurisdiction hearing, because at no place in the declaration does mother state when she gave Eloisa her telephone number. Mother thus failed to establish that if the social worker had asked Eloisa for the telephone number, it would have resulted in locating her.

Moreover, as indicated in the April 2008 DCFS detention report for A.G.'s sibling, S.S., mother advised the social worker that she "did not have access to a telephone," though she could receive messages via her boyfriend's telephone. Mother does not explain when her access to the phone number she gave Eloisa ceased. Also, as the juvenile court aptly noted in denying the motion, mother failed to provide the telephone number that she claimed could have been used to reach her, or to give the address at which she could have been located.

The record establishes that at the time DCFS was attempting locate mother for the jurisdiction and disposition hearings, mother was homeless. She does not contend otherwise. Because mother never divulged an address or location where she could have been located by a means DCFS purportedly failed to utilize, the situation is readily distinguishable from the notice cases relied upon by mother. (Cf. *In re Megan P.* (2002) 102 Cal.App.4th 480, 489; *In re Arlyne A.* (2002) 85 Cal.App.4th 591, 598-599; *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 104; *David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1014, 1016.)

Accordingly, the juvenile court did not abuse its broad discretion or otherwise err in denying mother's motion.

IV. Any error as to notice was harmless under the circumstances.

Even if we were to find that the social worker erred in not asking Eloisa for mother's telephone number or giving Eloisa a business card or contact information, and that the juvenile court had erred in proceeding with the jurisdiction and disposition hearings, such errors were harmless beyond a reasonable doubt. (See *In re J. H., supra,* 158 Cal.App.4th at p. 183.) Similarly, even assuming that the addresses used by DCFS to mail notice to mother had no historical or other reasonable connection to mother's transient whereabouts, that DCFS inadequately investigated the Valerio Street address by only contacting the apartment manager there, and further that notice by first class mail was inadequate (see § 291, subd. (e)(1) [service of notice "shall be given . . . by personal service or by certified mail, return receipt requested"]), such errors were likewise harmless beyond a reasonable doubt.

It is mother's burden on appeal to prove she was harmed by any error as to notice. (See *In re Phillip F.* (2000) 78 Cal.App.4th 250, 260.) To prove prejudice, mother would have to show that she could have been contacted by DCFS or would have contacted the social worker if given the social worker's number, and that after such contact mother would have come to court. Additionally, mother would have to establish that if she had appeared at the hearing, it is reasonably probable that a more favorable result would have ensued—i.e., that A.G. would have been released to her custody and the case dismissed, or at least that mother would have received reunification services.

The record indicates that none of the above was remotely likely. Both Eloisa and mother knew how to contact DCFS, and mother acknowledged that she knew "the system." Eloisa specifically advised mother that A.G. had been assigned a social worker and mother needed to contact DCFS. There is no reasonable possibility mother would have contacted DCFS if, for example, Eloisa had also given mother a telephone number. She was aware of the dependency proceedings but nonetheless failed to contact DCFS. Giving her a phone number or a business card would have changed nothing.

Most significantly, the outcome would not have been any different if mother had attended the proceedings. A.G. had lived with Eloisa since he was two weeks old. Although mother was allowed to live with Eloisa for several months, mother did not play an active role in A.G.'s care. She visited occasionally, but never provided for the child. The record establishes that she had no contact with A.G. after April of 2007.

At the time of A.G.'s jurisdiction and disposition hearings in June of 2007, mother was a homeless drug addict who had in effect abandoned her son (though there was no judicial finding to that effect), had failed to reunify with four of his siblings in prior dependency proceedings, and had her parental rights terminated as to those children. Mother's presence at the jurisdiction and disposition hearings would not likely have resulted in a different outcome. Similarly, had mother appeared at the six-month review hearing in December of 2007, there is no reason to believe she would have received reunification services.

The outcome would not have been any different because there is no reason to believe she was substantially any better able to care for a child during A.G.'s dependency proceedings than she was when she was denied reunification services with his sibling, S.S., in April of 2008. As to S.S., DCFS recommended that mother not receive family reunification services due to mother's 10-year history of drug abuse and relapse, and the fact that the juvenile court had terminated her parental rights to (at that time) four of her children. The juvenile court denied reunification services as to S.S. (see § 361.5, subd. (b) (10) & (11)), and the same no doubt would have occurred as to A.G. even if mother had been present.

As we observed in our prior opinion sustaining the juvenile court's order denying reunification services with S.S.: "The evidence before the court was that mother had a long history of drug abuse, and her failure to overcome those problems led to her losing parental rights to five of her children. Although mother enrolled in a residential drug treatment program after [S.S.'s] birth, at the suggestion of the DCFS social worker, she had been in the program only a few weeks at the time the court sustained the petition. Viewed in the context of mother's long history, her brief period of sobriety was not

sufficient to demonstrate that she could maintain a sober lifestyle. Mother had no stable home, no job, and a demonstrated inability to parent any child, let alone a newborn. This evidence supports the court's finding that [S.S.] would be at risk of physical and emotional harm and damage if released to mother." (*[S.] S. v. Superior Court*, *supra*, at p. 5.)

Accordingly, even if mother had attended every hearing, nothing would have changed. Any error that caused her not to be present was harmless beyond a reasonable doubt.

DISPOSITION

The orders under review are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J. CHAVEZ, J.